In the Matter of Merchant Mariner's Document No. Z-58413 and all other Seaman Documents
Issued to: OCTAVIO SOTO

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

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OCTAVIO SOTO

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 25 May 1960, an Examiner of the United States Coast Guard at Houston, Texas revoked Appellant's seaman documents upon finding him guilty of misconduct. The two specifications found proved allege that while serving as an oiler on the board the USNS POTOMAC under authority of the document above described, on or about 10 November 1959, Appellant assaulted and battered a member of the crew, Jewel E. Irby, with a dangerous weapon, to wit: a fire ax.

At the hearing, Appellant was represented by counsel. Appellant entered a plea of not guilty to the charge and both specifications.

The Investigating Officer introduced in evidence the testimony of Irby and First Assistant Engineer as well as portions of the ship's Official Logbook for the voyage.

Appellant presented two character witnesses and testified himself. Appellant denied that he hit Irby with a fire ax. Appellant testified that he was awakened by Irby asking Appellant why he had cut Irby.

At the end of the hearing, the Examiner rendered the decision in which he concluded that the charge and two specifications had been proved. The examiner then entered an order revoking all documents issued to Appellant.

FINDINGS OF FACT

On 10 November 1959, Appellant was serving as an oiler on board the USNS POTOMAC and acting under authority of his document while the ship was at sea. (The crew members signed Shipping Articles for the Voyage.)

Appellant and fireman-watertender Irby shared the same room and stood 8 to 12 watches. Irby had the upper bunk and Appellant

the lower bunk. Prior to 10 November, Irby was told by Appellant that he objected to Irby sucking his teeth while in his bunk. Appellant told pumpman Rumion that this habit of Irby was objectionable to Appellant.

On 10 November 1959, Appellant and Irby were awake in their bunks after the 2000 to 2400 watch. About 0120, Appellant suddenly got up, started cursing, and walked out of the room leaving Irby alone. Within five minutes, Appellant returned with a fire ax, turned on the overhead light, said he was going to kill Irby, and twice swung the ax at him. The first time, the side of the ax head struck Irby on the left wrist. The second time, the ax blade cut Irby's left arm above the wrist inflicting a deep gash about 1 1/2 inches long. On the second swing, the point opposite the ax blade scraped the overhead. Irby was a large man and there was not more than three feet between the upper bunk and the overhead. There was little he could do to protect himself. After the second blow, Irby got out of his bunk and started to dress. Appellant left the room without any further attempt to injure Irby. The latter had his wound dressed by the Purser and was relieved of his duties.

Later on the morning of the same day, the Master conducted an investigation of the incident. Appellant told the same story as he testified to at the hearing. Appellant answered in the negative when asked if he had been taking medicine, drinking, smoking marijuana, and whether he had ever walked in his sleep. No liquor, marijuana or weapon was found in the room or with Appellant's belongings. Appellant and Irby were assigned to separate quarters.

On 11 November, Appellant fell and injured his back. He and Irby were hospitalized at Acapulco, Mexico, on 15 November. They were friendly toward each other while in the hospital. Irby was released on 19 November. When he testified at the hearing two months later, the movement of his left wrist was limited to some extent. At that time, Irby had a damage suit pending as a result of his injuries.

Appellant caused no other trouble on the voyage and professionally, he is a very competent seaman. He has no prior record during 23 years at sea and has a good reputation ashore according to his neighbors.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contented that:

1. An order of revocation requires proof that Appellant had a specific intent to injure Irby seriously without justifiable cause.

2. Irby was not seriously injured although he did not attempt to defend himself. He was friendly toward Appellant in the hospital. The reasonable inference from this testimony by Irby is that Appellant did not intend to inflict serious bodily harm and that, at the hospital, Irby did not regard Appellant as a dangerous person. Furthermore, Irby's testimony was colored by his pending suit for damages.

3. There is uncontradicted evidence in the record as to Appellant's good character. This is an isolated incident in Appellant's otherwise unblemished career for 23 years.

In conclusion, it is respectfully submitted that the order should be modified to an admonition or suspension in the absence of convincing, unbiased evidence that this was an intentional, serious offense.

APPEARANCE: Richard W. Ewing, Esquire, of Houston, Texas, of Counsel.

OPINION

Proof of a specific intent to injure Irby was not required since the fact that Appellant swung the ax toward Irby was conduct which was likely to result in serious injury to Irby. Nevertheless, Appellant's threat to kill Irby indicates that there was a specific intent to injure him seriously.

As a matter of credibility to be decided by the trier of the fact, the Examiner accepted Irby's testimony as a truthful version of what occurred. On the basis of this testimony, the order of revocation is warranted regardless Appellant's prior good behavior and reputation.

As stated by Irby, there was not much he could do to protect himself in the limited space available. The same limitation probably prevented more serious injuries because, on the second swing when Irby was cut, the force of the blow was decreased when the ax head scraped the overhead before striking Irby's left arm. (This scraping was established by the First Assistant Engineer's testimony that there was red point on the white-painted overhead and whit paint on the red-painted ax nearest to the room.) Other evidence indicates that there was limited space in which to swing the ax effectively so as to strike Irby.

The friendliness between the two seamen in the hospital was explained by Irby's testimony that the nurses could not speak English. Consequently, Appellant served as a translator between Irby and the hospital personnel.

Irby definitely identified Appellant as the assailant. Appellant has not made any claim that he acted with justification or committed the act without knowing what he was doing. At the hearing, Appellant simply denied that he did it. Accepting the testimony of Irby as did the Examiner, it is presumed that Appellant was conscious of what he was doing when he attacked Irby. The only explanation seems to be that Appellant was extremely annoyed by Irby's habit of sucking his teeth.

The fact that Irby sued for damages as a result of his injuries is not sufficient reason to reject his testimony.

The first specification is dismissed since the allegations contained therein are included within

the second specification alleging assault and battery with a dangerous weapon.

Although this may be an isolated incident in Appellant's life, it is so serious that the order of revocation will not be modified.

ORDER

The order of the Examiner dated at Houston, Texas, on 25 May 1960, is AFFIRMED.

J. A. Hirshfield

Vice Admiral, UNITED STATES COAST GUARD
Acting Commandant

Signed at Washington, D. C., this 1st day of May 1961.